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No. 82-1110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioner,

v.

CLIPPER EXXPRESS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Trucking Associations, Inc. (ATA) moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

ATA is the national trade association of the trucking industry, representing all types of motor carriers of property. ATA, and the numerous motor carriers and state motor carrier associations it represents, are continuously involved in administrative proceedings before federal and

state agencies, as well as judicial review of such proceedings.

ATA, on behalf of itself, its affiliated state associations and its member carriers, is vitally interested in the constitutional issues involved in this action.[1] Further, ATA is concerned with the continued ability of itself and the carriers it represents to continue to participate in the regulatory framework of the Interstate Commerce Act without fear of retaliatory actions in the form of civil antitrust suits.

The decision rendered by the Court of Appeals for the Ninth Circuit raises the spectre of treble damage liability for motor carriers and their associations for even the most routine and benign participation in the administrative process. Indeed, the decision appears to eliminate First Amendment protection for an administrative protest simply because it is eventually unsuccessful. The chilling effect of the decision on the exercise by ATA, its affiliated associations and the carriers they represent is of concern to the entire motor carrier industry.

ATA submits that its participation will provide an additional perspective that may be valuable to the Court in this case.[2] Furthermore, the granting of this motion will not cause any harm or prejudice to any party.

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[1] The Court has recognized that associations such as ATA "perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 247 (1962) (per curiam). ATA received permission to appear and filed an *amicus curiae* brief in support of the petition for rehearing in the Court of Appeals. ATA has also appeared and filed on previous occasions *amicus curiae* briefs on behalf of the regulated motor carrier industry in proceedings before this Court; *e.g., Southern Pacific Transportation Co. v. Commercial Metal Co.*, —— U.S. ——, 102 S. Ct. 1815 (1982).

[2] Counsel for respondents has denied ATA's request for written consent to participate as amicus in this appeal.

CONCLUSION

Accordingly, this Motion for Leave to File Brief Amicus Curiae in Support of Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January, 1983

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is the national trade association of the trucking industry, representing all types of carriers of motor freight. ATA and the numerous motor carriers it represents are continuously involved in administrative proceedings before federal and state agencies. Therefore ATA, on behalf of itself, its affiliated associations and its member carriers,

is vitally interested in the constitutional issues involved in this action.[1] The decision rendered by the Court of Appeals for the Ninth Circuit raises the spectre of treble damage liability for even the most routine and benign participation in the administrative process. Indeed, the decision appears to eliminate First Amendment protection for an administrative protest simply because it is eventually unsuccessful. That will surely chill the exercise of the right to petition by ATA and the carriers it represents.

ARGUMENT

The basic question presented by this case is under what circumstances a use of the legal process may be a violation of the antitrust law. Or, where does the First Amendment right to petition end and treble damages liability begin? The Court of Appeals' answer to the question would result in potential antitrust liability where it has never existed before. The lower court's decision will also inhibit exercise of the right to petition, especially where exercise of the right would affect competition. The volume of such petitioning activity is enormous. Much of it is legislative in nature, occurring in arenas where lively, unrestricted debate is most important.

I. THE VOLUME OF THE AFFECTED PROCEEDINGS

This case arises out of a motor carrier's protest of a competitor's rate which must be approved by the Interstate Commerce Commission (ICC). This kind of peti-

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[1] The Court has recognized that associations such as ATA "perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *National Motor Freight Traffic Ass'n. v. United States*, 372 U.S. 246, 247 (1962) (per curiam). ATA received permission to appear and filed an *amicus curiae* brief in support of the petition for rehearing in the Court of Appeals.

tioning activity involves a great number of proceedings and all such proceedings would be affected by the Court of Appeals' decision. There are currently more than 24,000 motor carriers of freight regulated by the ICC. Each must obtain an ICC certificate to provide service subject to the ICC's jurisdiction (49 U.S.C. § 10921), and each must file its rates and have the ICC approve such rates. 49 U.S.C. §§ 10761-62. In 1981, motor carriers of freight filed 467,373 rate applications and more than 20,000 operating rights applications with the ICC.[2] All of those filings were subject to protest by interested parties, especially competitors. 49 U.S.C. §§ 10708, 10922.

The Interstate Commerce Commission has quite recently acknowledged the importance of individual proceedings on rate matters before it. *Lawfulness of Vol. Discount Rates Mot. Com. Car.*, 365 I.C.C. 711, 716 (1982). In that proceeding the ICC stated its unqualified support for the consideration of proposed rates on an individual basis pursuant to the procedures contained in Chapters 107 and 111 of Title 49 of the United States Code. *Id.* In fact, the ICC there declined to initiate a proceeding to develop guidelines on the lawfulness of discount rates in favor of such individual proceedings.

The right to protest rate filings is an essential and integral part of this entire process of ensuring lawful and reasonable rates for the transportation of freight by truck. The chilling effect of the Ninth Circuit's decision on the rights of motor carriers to participate in such proceedings will obstruct implementation of a principal element of the national transportation policy, mandated by Congress, 49 U.S.C. § 10101(a), to be implemented by the ICC.

Moreover, ICC rate and operating authority proceedings, numerous as they are, make up only a fraction of

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[2] ICC 1981 Annual Report, Appendix B, Tables 1 and 7.

the situations that bring motor carriers into conflict with competitors before administrative agencies. Motor carriers are constantly involved in rulemaking and formal and informal administrative proceedings before the ICC on all aspects of their business.[3] Furthermore, they are subject to similar regulation on all these matters by numerous state regulatory agencies. Thus, beyond the 467,373 motor carrier rate proceedings and the 20,000 operating authority proceedings before the ICC in 1981, there were cumulatively hundreds of thousands of additional proceedings before the agencies in those states that regulate intrastate rates and practices similar to the federal system.[4] Participation in all such proceedings by interested competitors is greatly influenced by this Court's interpretation of their First Amendment rights.

Participation in state and federal administrative proceedings is a business and competitive necessity. Thus, motor carriers need to know when such participation will expose them to treble damages. In view of the inability of the courts of appeals to agree on an answer to that question,[5] it is clearly up to this Court to tell them.

ATA is concerned primarily with the problems which the uncertainties in the law cause for motor carriers. But the thousands of other businesses whose right to op-

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[3] *See* generally any recent ICC Annual Report, especially Appendix B, which lists the "Commission Workload."

[4] *See, e.g.*, Calif. Pub. Utilities Code §§ 455, 487-88, 491, 520; Haw. Rev. Stats. §§ 271-20(e), 271-21(e), 271-22(a), (c), 271-32(b); Kans. Stats. Ann. §§ 66-113, 66-117(a)-(c); Vermont Stats. Ann. §§ 223-224. The only states that do not have some form of economic regulation of transportation are Maine, Florida, Arizona, New Jersey and Wisconsin.

[5] The conflicts between the various courts of appeals over the proper scope of the "sham" exception to the *Noerr-Pennington* doctrine are set forth in the Petition For Certiorari at pages 10-12 and Appendix F to the Petition.

erate in a particular area or in a particular way or at a particular price depends on the approval (or acquiesence) of a regulatory body confront the same problems. Thus, as for motor carriers, applications, protests and contested administrative proceedings are part of the normal competitive arena for all industries subject to regulation by agencies such as the Federal Communications Commission, Federal Maritime Commission, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and numerous other federal, state and local agencies.

The activities that require participation before one or another of these agencies cover an extremely broad range. For example, antitrust litigation based on charges that the participation was "sham" may arise out of virtually any of the seemingly limitless number and variety of license and permit applications required to conduct business.[6] And, of course, the "sham" antitrust theory is

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[6] *See, e.g., Alexander v. National Farmers Organization*, 1982 CCH Trade Cases § 64,914 at p. 72, 654 (8th Cir. 1982) (U.S. Dept. of Agriculture milk marketing qualification); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D.PA 1966) (pipe specifications); *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 112 F. Supp. 676 (E.D.MO 1953) (import controls); *B.A.M. Liquors v. Satenstein*, 1976-2 CCH Trade Cases § 60,997 (S.D.N.Y. 1976) (liquor licenses); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (building permits); *Kurek v. Pleasure Driveway and Park Dist. of Peoria*, 557 F.2d 580 (7th Cir. 1977) *vacated and remanded*, 435 U.S. 992 (1978), *on remand*, 583 F.2d 378 (7th Cir. 1978) *cert. denied*, 439 U.S. 1090 (1979) (concessions); *Aloha Airlines v. Hawaiian Airlines*, 349 F. Supp. 1064 (D.HI 1972), *aff'd*, 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974) (subsidies); *Baker Driveway Co. v. Bankhead Enterprises*, 478 F. Supp. 857 (E.D.MI 1979) (patents); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163 (E.D. MO 1976) (charter).

not limited to the administrative setting. Any litigation or use of the legal process may and does give rise to the same kinds of charges by competitors.[7]

In sum, participation by competitors in the legal and administrative processes is pervasive and essential to our economic and governmental systems. It is thus for good reason that the right to use these processes is guaranteed by the First Amendment. The exercise of that right must not be inhibited by fear of treble damages liability or uncertainty in the law. Yet that is just what the Ninth Circuit's decision does. This Court should review that decision.

II. THE NATURE OF THE AFFECTED PROCEEDINGS

This Court should review the Ninth Circuit's decision not only because of the *volume* of proceedings and petitioning activities it affects, but also because of the *nature* of those proceedings and activities. The Ninth Circuit's decision imposes requirements of caution and delicacy in the legislative arena where debate is and should be bold and robust.

The Ninth Circuit acknowledges that the so-called "*Walker-Process* doctrine" of antitrust liability for fraud in an agency proceeding must be limited to misrepresentations made in an *adjudicatory* proceeding. 674 F.2d at 1271. The Ninth Circuit then *assumes*, without discussion or citation of authority, that the ICC rate proceeding involved in this case was "adjudicatory." That assumption is contrary to explicit decisions of this Court, and it destroys the important distinction between the adjudicatory and legislative arenas.

This Court has repeatedly held, over a span of 75 years, that "the function of rate-making is purely legislative in its character, and this is true, whether it is exercised

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[7] *See*, for example, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.C. 623 (1977).

directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated." *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 8 (1909).[8] As the Court, Justice Holmes, explained in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1980):

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ."

The same conclusion applies where, as in this case and countless other similar ICC proceedings, the agency investigates a rate to determine whether it is lawful. The Court has specifically addressed this point in *Louisville and Nashville RR. v. Garrett*, 231 U.S. 298, 307 (1913):

> "The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and, it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character . . .

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[8] *Accord, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 386 (1931); *Baer Brothers Mercantile Co. v. Denver & Rio Grande RR.*, 233 U.S. 479 (1913).

> the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. . . . It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' "

It makes good sense to conclude that an administrative rate proceeding is legislative, not adjudicatory. Rate proceedings involve broad questions of policy and philosophy on which opposing parties can *reasonably* hold conflicting views: Are the rates reasonable? Do they constitute unfair or destructive competitive practices? Are they unreasonably discriminatory? *See, e.g.*, 49 U.S.C. §§ 10101, 10701, 10708 and 10741.

The ICC rate proceeding involved here is a good example. The freight-all-kinds tariff Clipper Exxpress filed was a radical departure from established policy that it is generally unfair to charge the same rate for hauling very dissimilar commodities. *See Merchandise to and from Chicago*, 66 M.C.C. 287, 293 (1956). Clipper Exxpress even labeled its own tariff "experimental." The ICC's resolution of the dispute over that tariff was a legislative policy judgment, not an adjudication of particular facts. The debate on the question was free-swinging, but that is as it should be. All parties had a full and fair chance to argue their positions, and the ICC made a judgment that the new tariff was a lawful experiment. The process worked as it should work.

Thus, the Ninth Circuit's assumption that the rate proceeding was "adjudicatory" is contrary both to this Court's decision and to the realities of rate regulation. The result is that the Ninth Circuit's decision makes the chilling risk of treble damages the price for joining in the rough and tumble of debate that is basically political and legislative. This Court should review the decision and avert this threat to the First Amendment.

CONCLUSION

The Ninth Circuit decision below will chill the exercise of the right to petition the government. The decision affects a truly staggering number of administrative and judicial proceedings. It also intrudes on the legislative process. This Court should grant a writ of certiorari to review the Ninth Circuit's decision.

Respectfully submitted,

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